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No. 85-2102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

MONTAUK-CARIBBEAN AIRWAYS, INC.,
d/b/a LONG ISLAND AIRLINES,

Petitioner,

v.

JUDITH HOPE, *et al.*,

Respondents.

PETITIONER'S REPLY BRIEF

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

In an effort to avoid the merits of this case, the Respondents in their Joint Brief in Opposition have misstated certain key facts and have suggested that the issues here for decision are not here at all. They are wrong in both respects.

THE FACTS

The Town states in its brief[1] that "MCA attempted to continue its FBO operations" at the airport but

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[1] Hereinafter, "Town Brief," at 5-6.

was prevented from doing so by the Town. This is only part of the truth. The Town prohibited MCA from even flying into the East Hampton Airport, much less providing FBO services. The Town did not concede MCA's right to fly into East Hampton until November 1985.[2] The Town is still attempting to prohibit MCA from providing ground support services as well as FBO services. These continuing efforts by the Town to prohibit these services constitute the heart of MCA's case, namely, that regulation of an air carrier by a municipality instead of deregulation compelled by federal law is improper and illegal.

Secondly, and more importantly, the Town straightfacedly suggests[3] two nearly anomalous positions. In one breath, the Town states that MCA should seek its relief in an administrative hearing conducted by the FAA, and, further, that the results of that investigation to date demonstrate that "the Aviation Administration did not find that the Town was discriminating against MCA."[4] Both statements beg credulity. First, taking them in reverse order, the FAA as a result of its informal investigation has specifically found that the Town has discriminated against MCA:

> We will be forced to conclude that the Town's refusal to grant Long Island Airlines [MCA] permission to operate on a year-round basis is in violation of its grant agreements and the Federal Aviation Act unless the Town

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[2] Curiously, this was the day before oral argument in this case before the Second Circuit.

[3] Town Brief at 14 and 15 in the text and footnote.

[4] Continuation of footnote at 15.

> articulates *nondiscriminatory* reasons for its refusal.[5] (emphasis added)

Less than six weeks later, the Regional Counsel again wrote to Mr. Stein and stated:

> We conclude from these facts that the Town's refusal for more than one year to grant MCA permission to operate year-round without substantive reasons, is tantamount to granting the present year-round FBO an exclusive right from October 1 through April 30 and indicates that *MCA is not being treated on fair and reasonable terms and without unjust discrimination.*[6] (emphasis added)

Contrary to the Town's assertions in its brief, the FAA *did* find discrimination on the part of the Town against MCA. Notwithstanding, the Town then suggests that the FAA investigation should be MCA's exclusive remedy, neglecting to state to this Court that the Town has consistently ignored the FAA's findings. It was only because the Town persistently refused to abide by the FAA mandates that it cease its discriminatory behavior against MCA that MCA was compelled to institute this litigation. Yet now the Town suggests that MCA should not be permitted to continue the litigation but instead seek its remedies through the FAA whose authority has been totally ignored by the Town. It is small wonder that the

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[5] FAA Regional Counsel letter of November 21, 1984 to Russell S. Stein, Town Attorney. Full text of letter contained at Appendix G in MCA Petition beginning at 49a.

[6] FAA letter of January 7, 1985 to Russell S. Stein. Full text of letter is contained at Appendix H of MCA Petition beginning at 51a.

Town does not want these issues resolved by the federal courts.

ALL ISSUES ARE PROPERLY BEFORE THIS COURT

The Town suggests that claims for relief pursuant to 49 U.S.C. § 2210 and the supremacy clause were not before the lower courts and thus cannot be heard here. This is incorrect for two reasons.

A. 49 U.S.C. § 2210

Paragraph 42 of MCA's Complaint specifically states that "the defendants violated the assurances required by 49 U.S.C. § 2210a . . . in unfairly discriminating against [MCA]. . . ."[7] The relief sought included a request for "a permanent injunction . . . prohibiting [the Respondents] from interfering with the year round operation of [MCA] as an air carrier and fixed base operator."[8]

Further, the United States District Court *held* that "a claim falling under § 2210(a) cannot withstand scrutiny. . . ."[9] The Second Circuit at the beginning of its opinion stated that MCA in its Complaint alleged violations of 2210(a).[10] Plainly § 2210(a) is a part of this case. It was pleaded in the lower court, decided by the lower court, and referred to by the Second Circuit in its opinion. Additionally, all reme-

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[7] MCA Petition at 9a.

[8] MCA Petition at 13a.

[9] September 4, 1985 decision of Eastern District, MCA Petition at 29a.

[10] MCA Petition at 32a-33a.

dies sought pursuant to 42 U.S.C. § 1983 are derivative of other federal laws. The 1983 claim before this Court is based upon rights derived from 42 U.S.C. § 2210(a). *See New York Airlines v. Dukes County*, 623 F. Supp. 1435 (D.C. Mass. 1985). In the § 1983 count of the Complaint, MCA explicitly referred to all of the activities described in the previous paragraphs of the Complaint, including the earlier reference to § 2210.[11]

B. Supremacy Clause

The Town also claims that the supremacy clause argument is newly asserted before this Court. This statement similarly is incorrect. The entire thrust of Count II of the Complaint stated MCA's position that § 1305 preempts state law.

> 38. 15 USC § 1305 provides for federal preemption and prohibits any state or political subdivision thereof from regulating rates, routes or services of any air carrier, thereby prohibiting the Town from denying equal access by [MCA] to the Airport.[12]

Further, that these claims are based upon the supremacy clause is demonstrated not merely in the fact that they were specifically referred to in the Petition for Rehearing filed in the Second Circuit,[13] but it is implicit in the Second Circuit's ruling that the N.Y. State laws—by virtue of § 1305(b)—preempt the pro-

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[11] MCA Petition at 11a.

[12] MCA Petition at 8a.

[13] Town Brief at 28.

visions of 49 U.S.C. § 1305(a).[14] The supremacy clause is and always has been an intrinsic element of this case.

Moreover, even if this Court were to find that despite the language of the Complaint and the findings of the lower courts that § 1983 and implied rights of action under § 2210 as well as preemption of state law by § 1305 were not raised and decided below, this Court has the authority and opportunity to decide those issues. The Town relies upon *McGoldrick v. Compagnie Generalie Transatlantique*, 309 U.S. 430 (1940) for the proposition that this Court "does not decide questions not raised or resolved in a lower court."[15] The *McGoldrick* decision, however, addressed only issues raised for the first time in this Court on appeal from a *state* supreme court. Importantly, that case, and its progeny, hold that when the case arises from a *federal* court then this Court will, under certain circumstances, consider issues not raised below.

For example, in *Singleton v. Wulff*, 428 U.S. 106 (1976), this Court noted:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule. Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as

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[14] MCA Petition at 40a-41a.

[15] Town Brief at 20.

> where the proper resolution is beyond any doubt [citation omitted] or where "injustice might otherwise result" [citation omitted].

422 U.S. at 121. These two examples were expressly "not intended to be exclusive." 428 U.S. at 121, n. 8.

Importantly, in *Singleton*, Justice Blackmun discussed the reasons for this rule of appellate practice. He wrote that in cases in which evidence has been taken and the matter fully litigated, it is not just to permit a new issue to be raised on appeal without the opposing party having had an opportunity below to elicit evidence in his behalf. Here, of course, MCA was given no opportunity to present *any* evidence. The case was dismissed pursuant to a motion under FED.R.CIV.P. 12(b)6. Thus, since the underlying basis for the rule does not appear in this case, the rule itself should not apply. Moreover, in *Singleton*, this Court noted that the limitation on appellate review applied to issues "not passed on below." 428 U.S. at 120. Here, both the District Court and the Court of Appeals were presented with the issues which the Town now claims were not raised.

Finally, if this Court were to permit the decision of the Second Circuit to stand on the sole ground that the important federal issues squarely presented by the Petition for Writ of Certiorari were not raised below, there is little doubt that "injustice will result." This injustice will affect not only MCA, but as can be seen from the brief *amicus curiae* filed by the Regional Airline Association, the injustice will affect the entire airline industry as well as the passengers transported by that industry. Under these circum-

stances this Court should grant the writ of certiorari and decide these important federal issues.

THE PREEMPTION ISSUE IS OF OVERRIDING FEDERAL IMPORTANCE

Ordinarily, one reviewing the Petition for Writ of Certiorari might conclude that MCA and the *amicus* have overstated the danger and importance to the airline industry of the lower courts' decision that 49 U.S.C. § 1305(b) overrides 49 U.S.C. § 1305(a). The incorrectness of such a conclusion, however, could not be more dramatically confirmed than by the position taken by the Town in its Brief in Opposition.

The Town claims that the interpretation of § 1305(a) urged by the airline industry renders § 1305(b) "completely nugatory."[16] In fact, the airline industry urges that while under § 1305(b) a local authority may exercise some proprietary powers, it may not interfere with rates, routes and services as expressly proscribed by § 1305(a).[17] The fact that the decision of the Second Circuit lends support to the argument asserted by the Town indicates the tremendous impact that the ruling will have upon the industry across the country. Every local authority, relying upon the decision of the Second Circuit, will have the opportunity to act as a local Civil Aeronautics Board and effectively turn the congressional purpose embodied in deregulation squarely on its head. Beyond doubt, that was not the intention of Congress in adopting this legislation. If a court is to decide that Congress intended for there to be hundreds of independent bodies na-

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[16] Town Brief at 30.

[17] Regional Airline Association Brief *Amicus Curiae* at 9-13.

tionwide which can determine rates, routes and services for the airlines by calling their actions "proprietary," such a decision should come only from this Court.

CONCLUSION

For these reasons, and those urged in the Petition for a Writ of Certiorari, Petitioner respectfully requests this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit in order that the decision of that court be reversed.

Respectfully submitted,

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